Supreme Court of the United States

OCTOBER TERM, 1893

No. 163

HENRY C. PETIT, UNITED STATES MARSHAL FOR THE DISTRICT OF INDIANA, *Appellant*,

vs.

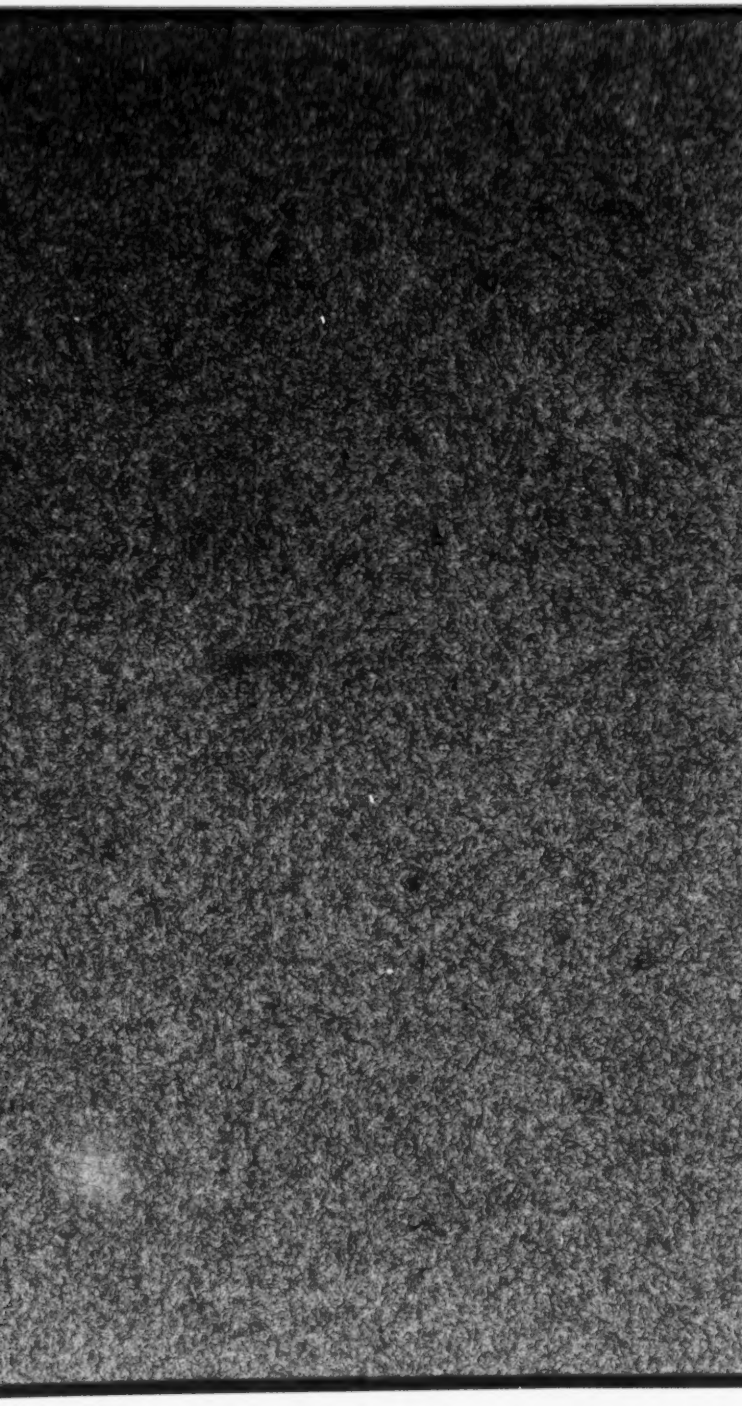
THOMAS WALKER,

APPEAL FROM THE CIRCUIT COURT OF THE DISTRICT OF INDIANA.

ANSWER TO ASSIGNMENT OF ERROR.

ADDISON C. HARRIS,
FERDINAND WINTER,
Attorneys for Appellee.

The Bobbs-Merrill Printing Co., Indianapolis.



IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1903.

No. 563.

HENRY C. PETTIT, UNITED STATES MARSHAL FOR THE DISTRICT OF INDIANA, *Appellant*,

vs.

THOMAS WALSHE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

Comes now the appellee and makes answer to the appellant's assignment of errors herein and says:

First. There is no error in the record.

Second. Appellee pleads that immediately upon the

rendition of the opinion and entering of judgment in said cause discharging this appellee, as appears from the transcript of the record, the appellant did not except to the ruling and judgment of the court below, from which this appeal is prosecuted, but on the contrary, as appears from the transcript of the proceedings before Hon. Charles W. Moores, United States Commissioner for the district of Indiana in the matter of the extradition proceedings against James Lynchehaum, of which a certified transcript is filed herewith and hereto attached, marked Exhibit A., the complainant, at whose instance and in whose behalf the appellee was under the arrest from which he was discharged by the said ruling and judgment, immediately thereupon, in accordance with the said ruling and judgment, applied to Hon. Francis E. Baker, the judge of the Circuit Court of the United States for the district of Indiana, by whom said ruling and judgment was made, for a warrant for the arrest of appellee by the name of James Lynchehaun, upon which warrant appellee was arrested by the appellant and brought before said Hon. Charles W. Moores, before whom said matter was heard, and by whose judgment rendered therein on the merits, appellee was discharged, and which judgment of discharge is in full force.

Third. Appellee further pleads that immediately upon the making of the ruling and decision from which the appeal in this case is prosecuted, C. Clyde Bayley, his Britannic Majesty's acting consul at the port of New York, presented his complaint to Hon. Francis E. Baker, judge of the Circuit Court of the United States for the district of Indiana, in which it was alleged that the appellee by the name of James Lynchehaun had been convicted in the kingdom of Great Britain and Ireland, of the crime of assault and battery with the intent to com-

mit murder, and sentenced to penal servitude for life; and that he had escaped pending the execution of said sentence, and thereupon demanded the extradition of appellee, upon which complaint, said judge issued his warrant to the appellant in this cause commanding him to arrest appellee and bring him before Hon. Charles W. Moores, United States commissioner for the district of Indiana, specially authorized to act in matters of extradition, in order that the matters in said complaint alleged, might be heard, and extradition of appellee adjudged if said matters should be established. Upon which warrant, appellee was arrested by the appellant and brought before said Moores, commissioner, by whom the said matter was heard and by whose judgment thereafter on the 31st day of October, 1903, the appellee was discharged, which hearing and judgment were on the merits of said matter, all of which appears by a transcript of the proceedings and judgment in said matter duly certified by said commissioner, which is filed herewith and made a part hereof, as Exhibit A. Said judgment of discharge is in full force.

The appellee further avers and shows that he and the said James Lynchehaun, described in said proceedings, are one and the same person, and that the matters and things heard and determined by said commissioner are the same matters and things for which appellee was arrested and was under imprisonment, from which he was discharged by the ruling and judgment from which the appeal in this case is prosecuted, and not other or different.

ADDISON C. HARRIS,
FERDINAND WINTER,
Attorneys for Appellant.

EXHIBIT "A."

IN THE MATTER OF THE EXTRADITION PROCEEDINGS AGAINST JAMES LYNCHEHAUN.

It appearing that on the 11th day of September, 1903, a complaint had been duly filed in the office of the Hon. Noble C. Butler, clerk of the United States Circuit Court for the district of Indiana, the same being sworn to before the Hon. Francis E. Baker, judge of the said court, which complaint was subscribed and sworn to by C. Clyde Bayley, his Britannic Majesty's Acting Consul General at the port of New York, before Thomas Alexander, United States Commissioner for the southern district of New York, a commissioner duly authorized by the District Court of the United States for the southern district of New York to act as commissioner under the laws of the United States concerning the extradition of fugitives from the justice of a foreign government under the treaty and conventions between this and any other foreign government, which complaint charged in substance, that on or about the 15th day of July, in the year 1895, at the General Assizes and General Gaol Delivery, held at Castlebar, in the county of Mayo, before Mr. Justice Gibson, one James Lynchehaun was convicted of having, on October 6, 1894, unlawfully wounded one Agnes McDonnell with intent thereby and then feloniously and of his malice aforethought, her the said Agnes McDonnell, to kill and murder, and was sentenced to be kept in penal servitude for life, and was thereafter under and by virtue of said judgment and sentence, committed to the Maryborough convict prison in Queens county, Ireland, and that on the 6th day of September, 1902, before said sentence had been executed, did escape and is now at large, and the said sentence has never

been executed, and that the said Lynchehaun is a fugitive from the justice of the king of Great Britain and Ireland and is now within the territory of the United States, and that the crime for which he was so as aforesaid convicted and sentenced, is named in the treaty between the United States and Great Britain, and that the said affiant makes such affidavit upon information and belief based upon a certified copy of the certificate of conviction of the said Lynchehaun, the deposition of one Thayne, and the warrant for the apprehension of the said person as an escaped convict; which complaint is in the words and figures following, to wit:

IN THE MATTER OF THE APPLICATION FOR THE EXTRADITION OF JAMES LYNCHEHAUN, UNDER THE TREATY BETWEEN THE UNITED STATES AND GREAT BRITAIN.	COMPLAINT.

UNITED STATES OF AMERICA,

Southern district of New York, ss:

C. CLYDE BAYLEY, his Britannic Majesty's acting consul general at the port of New York, being duly sworn, doth depose and say upon information and belief:

First. That heretofore and on or about the 15th day of July, in the year 1895, at the General Assizes and General Gaol Delivery, a court of competent jurisdiction, for the county of Mayo, in that part of the United Kingdom of Great Britain and Ireland called Ireland, and within the jurisdiction of his said Britannic Majesty, held at Castlebar in said county, before the Right Hon. Mr. Justice Gibson, a justice of said court, one James Lynchehaun, was convicted of having on the 6th day of October, 1894, feloniously and unlawfully wounded one Ag-

nes McDonnell with intent thereby, then feloniously and of his malice aforethought, her, the said Agnes McDonnell, to kill and murder, and was by the said court, sentenced to be kept in penal servitude for the term of his natural life, and was thereafter under and by virtue of said judgment and sentence of said court, committed to the Maryborough convict prison, in Queens county, in Ireland, and that on or about the 6th day of September, in the year 1902, before the said sentence had been executed, the said James Lynchehaun did escape from the said Maryborough convict prison and is now at large, and the said sentence of the said James Lynchehaun has never been executed.

Second. That the said James Lynchehaun is a fugitive from the justice of the kingdom of Great Britain and Ireland and is now within the territory of the United States of America.

Third. That the said crime for which the said James Lynchehaun was so as aforesaid convicted and sentenced, is named and specified in the treaty between the United States and Great Britain.

Fourth. That deponent's information and belief are based upon a certified copy of the certificate of conviction of said James Lynchehaun, at the said court of Assizes, and the deposition of James William Thayne, and a warrant for the apprehension of the said James Lynchehaun as an escaped convict or criminal, all certified as required by the act of Congress, of August 3, 1882.

C. CLYDE BAYLEY.

Subscribed and sworn to before me this 4th day of September, 1903.

(SEAL.) THOMAS ALEXANDER,

United States Commissioner for the southern district of New York, and commissioner duly authorized by

the district court of the United States for the southern district of New York, to act as commissioner under the laws of the United States concerning the extradition of fugitives from the justice of a foreign government, under a treaty or convention between this and any foreign government.

And it appearing that a warrant has been issued on said 11th day of September, A. D. 1903, by the Hon. Francis E. Baker, judge of the United States Circuit Court for the district of Indiana, for the apprehension of the said Lynchehaun in accordance with the terms of the treaty between the United States and Great Britain touching the extradition of fugitives from justice and conventions supplemental thereto, which warrant is in the words and figures following, to wit:

The President of the United States to the Marshal of the United States within and for the district of Indiana, or any of his lawful deputies, greeting:

WHEREAS, Complaint has been made on oath under the treaty between the United States of America and her late Majesty, the Queen of Great Britain and Ireland, concluded and signed at Washington on the 9th day of August, 1842, and of the supplementary treaty between the same high contracting parties, signed July 12, 1889, before the undersigned, a judge of the Circuit Court of the United States for the district of Indiana:

That heretofore, on or about the 15th day of July, in the year 1895, at the General Assizes and General Gaol Delivery for the county of Mayo, in that part of the United Kingdom of Great Britain and Ireland, called Ireland and within the jurisdiction of his said Britannic Majesty, held at Castlebar, in said county, before the Right Hon. Mr. Justice Gibson, a justice of said court,

one James Lynchehaun was convicted of having on the 6th day of October, 1894, feloniously and unlawfully wounded one Agnes McDonnell, with intent thereby and then feloniously, and of his malice aforethought, her, the said Agnes McDonnell, to kill and murder, and was by the said court, sentenced to be kept in penal servitude for his natural life, and was thereafter under and by virtue of said judgment and sentence of said court committed to the Maryborough convict prison, in Queens county, in Ireland, and that on or about the 6th day of September, in the year 1902, before the said sentence had been executed, he, the said James Lynchehaun, did escape from the said Maryborough convict prison and is now at large, and the sentence of the said James Lynchehaun aforesaid has never been executed; and that the said James Lynchehaun is a fugitive from the justice of the kingdom of Great Britain and Ireland, and is now within the territory of the United States of America and is believed to be within the said district of Indiana; and that the said crime for which the said James Lynchehaun was so, as aforesaid, convicted and sentenced, is named and specified in the treaty between the United States and Great Britain.

NOW, THEREFORE, WE COMMAND YOU FORTHWITH, That you take the said James Lynchehaun and bring him before the undersigned or Charles W. Moores, a United States commissioner and commissioner specially appointed to act in extradition cases in the city of Indianapolis, in the district of Indiana, to the end that evidence of the criminality of the said James Lynchehaun may be heard and considered, and if deemed sufficient to sustain the charge, that the same may be certified, together with a copy of all the proceedings, to the secretary of state of the United States of America, that a

warrant may issue for his surrender pursuant to the said treaty.

WITNESS my hand and official seal this 11th day of September, A. D. 1903.

FRANCIS E. BAKER,
United States Circuit Judge,
7th Circuit.

On the said September 11, 1903, the said James Lynchehaun was brought before me, Charles W. Moores, United States Commissioner within and for the district of Indiana, duly authorized and empowered by the district court of the United States for the said district of Indiana, to act as commissioner under the laws of the United States concerning the extradition of fugitives from the justice of foreign governments, and particularly to discharge and perform all the duties required by the provisions of Section 5270 of the Revised Statutes of the United States, and to that end to execute the act of Congress entitled, "An Act for giving effect to certain treaty stipulations between this and foreign kingdoms for the apprehension and delivery of certain offenders," approved August 12, 1848, and of the several acts of Congress amendatory thereof, my authority thereunto being derived from the order of said court dated the 28th day of April, 1903. And thereupon in the presence of the said defendant, James Lynchehaun, and of his counsel, the said complaint was then and there fully read and explained to him, and he thereupon for his plea said that he was not guilty as charged in the said complaint.

And thereupon, in the preliminary trial to determine the identification of the person aforesaid and his probably criminality as required under such treaties and stat-

utes, and for the further purpose of the said hearing and examination, the counsel for the complainant, the British government, and for the defendant, James Lynchehaun, moved the court for a continuance of the further hearing of this cause until the 16th day of September, 1903, and the said motion being agreeable to both parties, said continuance was granted.

And thereupon, upon the same day I issued a temporary mittimus committing the defendant to the jail of Marion county, Indiana, pending examination, which temporary mittimus is in the words and figures following, to wit:

TEMPORARY MITTIMUS.

United States of America,
District of Indiana,
City of Indianapolis.

The President of the United States to the keeper of the jail in Marion county, state of Indiana, greeting:

WHEREAS, James Lynchehaun has been arrested upon the oath of C. Clyde Bayley, acting consul general for his Britannic Majesty, at the port of New York, charged with the following offenses, that is to say: That on or about the 15th day of July, 1895, at the General Assizes and General Gaol Delivery for the county of Mayo, in Ireland, held at Castlebar, the said defendant was convicted of having on the 6th day of October, 1894, feloniously and unlawfully wounded one Agnes McDonnell, with intent thereby and then feloniously and of his malice aforethought, her, the said Agnes McDonnell, to kill and murder, and was by the said court sentenced to

penal servitude for his natural life, and pursuant to such sentence was committed to the Maryborough convict prison in Queens county, in Ireland; and that on September 6, 1902, before such sentence had been executed, the said James Lynchehaun, not having been theretofore lawfully pardoned, did escape from said prison, and that said sentence has never been executed, and proceedings have been instituted under the provisions of Section 5270 of the Revised Statutes of the United States for the extradition of offenders, and said proceedings are in process of hearing before me, Charles W. Moores, United States Commissioner for said district of Indiana by the district court of said district of the United States duly authorized and empowered to conduct such proceedings, and the offense for which the said James Lynchehaun is being held is one for which no bail can be taken.

THESE ARE, THEREFORE, TO COMMAND YOU, In the name and by the authority aforesaid to receive said James Lynchehaun, prisoner of the United States of America, in the jail of said Marion county, in the state of Indiana, there to remain until recalled by my warrant for the purpose of further investigation as to the matters and things hereinbefore set forth, and until he be discharged by due course of law.

Given under my hand and seal in the city of Indianapolis, district of Indiana, this 11th day of September, A. D. 1903.

CHARLES W. MOORES,

United States Commissioner for the district of Indiana, and commissioner duly authorized by the district court of the United States for said district to act as commissioner under the United States concerning the extradition of fugitives from the justice of a foreign government under a treaty or convention between this and any foreign government.

On September 16, 1903, pursuant to the continuance of September 11, 1903, last above noted, the defendant, James Lynchehaun was brought before me, the said commissioner, in the United States Circuit Court by Henry C. Pettit, United States marshal, the defendant being present in person and by counsel anl the complainant by Charles Fox and Jesse J. M. LaFollette, its counsel. Thereupon the defendant, by leave of the court, withdrew the plea of not guilty heretofore entered in this cause and filed his motion to dismiss the proceedings on the ground that the commissioner had no jurisdiction to hear the same, and that the Hon. Francis E. Baker, judge of the United States Circuit Court for the district of Indiana, having issued the warrant, was the only court authorized to hear the case.

This motion the commissioner overruled. Thereupon the defendant, on leave of court, re-entered his plea of not guilty.

It was thereupon stipulated by counsel that certain documents taken at a former hearing similar in character to the present hearing looking to the extradition of the said James Lynchehaun, which former hearing was instituted on the 24th day of August, 1903, and dismissed on motion of the complainant on September 8, 1903, that is to say: The testimony of E. J. Weiss and —— given upon said hearing was to be accepted in this hearing in lieu of the verbal testimony of the said witnesses.

Thereupon the defendant offered in evidence the following documents, to wit:

The warrant issued by Jas. Woulfe Flanagan on December 16, 1902, for the apprehension of James Lynchehaun.

2. Deposition of Jas. Wm. Thayne, dated December 16, 1902.

3. Certificate of conviction dated December 16, 1902, executed by B. Whitney, clerk of the Crown and Peace for the county of Mayo.

4. Authenticating certificate of C. E. Troup, assistant under secretary of state, dated May 22, 1903, and authenticating certificate of Joseph H. Choate, United States Ambassador.

All attached and marked Exhibit A., W. N. Carpenter, stenographer.

Also document certified by B. Whitney and Henry Sheridan to be a copy of the record, trial and conviction of James Lynchehaun under date of September 2, 1903, to which are attached the authenticating certificates of Henry Cunyngham, assistant under secretary of state, on September 4, 1903, and also authenticating certificate of Joseph H. Choate, United States Ambassador.

To the admission of the documents last described, the defendant objected on the grounds:

1. That the certificates are authenticated "to the best of the authenticating officers' knowledge and belief."

2. That the warrant of the Irish magistrate did not show jurisdiction.

3. That the document purporting to be a copy of the record and sentence of the said James Lynchehaun was entitled "The certificate of the record of conviction" in the certificate of authentication.

The ruling upon these objections was suspended and the matter taken under advisement by the commissioner.

Thereupon the following witnesses were sworn and examined on the part of the complainant, that is to say: Richard Hicks and William Tynden. Upon the request

of the defendant, assented to by the complainant, this hearing was thereupon adjourned.

Upon September 21, 1903, complainant being represented by Jesse J. M. LaFollette and the defendant by Ferd Winter and Henry N. Spaan, the hearing was resumed and the commissioner announced that the objections of the defendant to the documents offered in evidence heretofore described were overruled and the documents were thereupon admitted in evidence and the hearing was adjourned until September 24, 1903, at 10 o'clock A. M.

On September 24, 1903, pursuant to the continuance of September 21, 1903, the defendant was brought before me, said Commissioner, at my said office, in said district, by H. C. Pettit, marshal, and the defendant being present, the following witnesses were sworn and examined on the part of the demanding government: Sergt. Richard Hicks, William Tynden, and their evidence being heard and concluded, request was made on the part of both the demanding government and the defense that this cause be continued until September 25, 1903, and on said 25th day of September, 1903, the following witnesses were sworn and examined on the part of the defendant; that is to say, the defendant himself, James Lynchehaun; and thereupon, evidence being heard, on the joint request and consent of both parties, the further hearing of this cause was continued until the 5th day of October, 1903, at which time the following witnesses on behalf of the defendant were sworn and examined, that is to say: Daniel Conway, Cleveland; Patrick Veasey, Cleveland; —— McNamara, and James Corrigan, Cleveland; Thomas J. Lynch, J. P. O'Mahoney, and Maurice Donnelly, of Indianapolis. Said evidence being heard and documentary evidence be-

ing submitted, this hearing was continued until the 6th day of October, on which day the further testimony of the said witnesses was heard. Thereupon, upon request of counsel for the demanding government, and for the defense, the further hearing of this cause was continued until the 12th day of October, 1903.

On October 12, 1903, the defendant being present in court, as upon each day heretofore named, argument was had by Charles Fox, Esq., of New York, for the British Government, and Henry N. Spaan and Addison C. Harris, for the defense, and J. J. M. LaFollette, for the British Government.

Said argument continued through the days of October 12, 13 and 14, and the argument being concluded on the day last named, leave was given to counsel to file briefs in support of their respective contentions, and briefs were duly filed and the cause was taken under advisement.

On October 31, 1903, pursuant to the continuance of October 14, 1903, aforesaid, the said hearing was resumed. Defendant was brought before me, the said commissioner, at the United States court room in the said district, at the city of Indianapolis, by H. C. Pettit, marshal, and the defendant being present, and the demanding government being represented by J. J. M. La Follette, Esq., its counsel, and the defendant by Henry N. Spaan and Ferd Winter, his counsel, the court rendered the following opinion and decision; that is to say:

In the Matter of the Proceeding for the Extradition of James Lynchehaun.

On August 24, 1903, a complaint was filed with this commissioner on behalf of the British government demanding the extradition of the prisoner upon the charge that having been convicted in Ireland of the crime of assault with intent to murder and sentenced to penal servitude for life, he has escaped and was still at large. Upon this complaint a warrant issued directing the marshal to bring the prisoner before the commissioner, to the end that evidence of his criminality, within the terms of the British treaty, be heard and considered. The arrest was made. After submitting a part of the evidence, the counsel for Great Britain dismissed the proceedings and caused a second warrant to be served which had been issued previously by a New York magistrate. To test the power of the marshal in Indiana to execute the New York warrant, the prisoner sought a writ of habeas corpus before the Honorable Francis E. Baker, Judge of the United States Circuit Court for the district of Indiana. The writ was granted. Thereupon a third complaint was filed. Upon this complaint Judge Baker issued his warrant directing that the cause be heard by this commissioner. Accordingly the evidence has been heard and considered. From this evidence it must be determined whether or not the prisoner shall be committed to the executive department of the United States to be surrendered. Before the commitment can be made the commissioner must be satisfied that the prisoner is the convict whose extradition is sought; that he is probably guilty of the crime of which he was convicted; that his sentence has not been executed; and, finally, that, within the meaning of the treaty, the offense for which

he is to be punished if he shall be extradited, is not "of a political character."

It should not be necessary to say that these questions must be determined upon the evidence before the court; and that the stories told in the press and elsewhere for the purpose of influencing public sentiment for and against the prisoner are no part of this case.

The Facts Proved.

From the evidence submitted I find that the following facts have been proved:

On October 6, 1894, James Lynchehaun assaulted his landlord, Agnes McDonnell, with intent to kill her. Of this he was convicted on July 15, 1895. He was sentenced to penal servitude for life and was in prison, executing the sentence, until September, 1902, when he escaped and found his way to Indianapolis. The record of his conviction establishes the probable criminality of which the treaty requires proof. That the prisoner is James Lynchehaun and that his sentence is still unexecuted are facts no longer disputed. There remains but the one question,—whether, within the meaning of the treaty as read, in the light of the precedents and of the law, this assault was "an offense of a political character." If it was, the prisoner must be discharged; if it was not, he must be committed to jail to await final action by the secretary of state, and the President of the United States.

For the purpose of proving that the offense was of a political character, and because the English rule very properly admits all evidence which may be tendered to show that the crime was of such a character (1 Consol. Dig. Quebec, 602; Re Rosenbaum (Montreal), Q. B.,

1874; 20 Los. Can. Jur. 165; Hawley on Extradition, page 16) the prisoner was permitted to tell his story of the circumstances attending the assault and describe the trial that resulted in his conviction. While his story was not taken to contradict the record of conviction, nor to mitigate the crime, it may not be amiss to say that even if it were admissible for that purpose, it could not have that effect in law. A blow struck by one of a party of conspirators, which is followed directly and by prearrangement by other blows inflicted by others in the conspiracy, even though the first blow, taken alone, were only an ordinary assault and a fatal result were not originally intended, would become, nevertheless, an act of manslaughter or of murder, if the succeeding acts in the conspiracy should result fatally. We have no evidence of the extent of Mrs. McDonnell's injury save in the record of the Irish court that the prisoner "wounded her with intent to murder," and in his own statement that his blow was followed by a kidnapping in which perhaps fifteen took part, and by "a very bad beating and a bad kicking" by a party of men and women.

For the purposes of this hearing it is proved that the prisoner was guilty of the crime of assault with intent to kill, and that this crime is identical in Ireland and in Indiana. (See *Queen* v. *Reno*, 4 Prac. R., Ont. 281.)

Evidence was received to show the social and political conditions in the county where the crime was committed, and throughout Ireland, from 1881 to 1894, and the court was asked to take judicial notice as a historic fact that these conditions have prevailed in Ireland for a hundred years.

The scene of the crime was Achill Island. It is a desolate island, fifteen or twenty miles long and thirteen miles wide, made up of mountain and bog land, and so

barren that perhaps less than one per cent. of the land is under cultivation. It affords a meager living for the twenty-three hundred families of tenants that occupy it, and little or no income for the six landlords that own it. Of these landlords three were absentees, and three, nominally residents, spent much [illegible]eir time abroad. Upon Achill Island, and throughout a large part of Ireland, the feeling between the tenants, forming one class or party, and the landlords, forming another, was very bitter. The landlords had their "Landlords' Protective Association," to which the Achill Island landlords belonged; and the tenants had a number of societies, chief among which were the Land League and the Irish Revolutionary Brotherhood. The avowed purpose of the Land League was publicly and by lawful means, through petition, memorial, and legitimate agitation, "to oppose the oppression of too exacting landlords" and to make "the ownership of the tenants permanent and safe, beyond the oppression of the landlords." The Irish Revolutionary Brotherhood, made up of a smaller number within the membership of the League, was a secret order into which none but able-bodied men, between the ages of eighteen and forty-five, were admitted. As declared by various witnesses who belonged to the order, its purpose was "to overthrow the dominion of England and its power over Ireland," "to free Ireland from English rule," to resist the military and constabulary by intimidation and by force, to prevent evictions, terrorize landlords, and "put England out and form a republican government." Its plan was to arm its members, and drill them, and, waiting until England should become involved in war with a first-class power, seize that opportunity to rise and "strike the blow for an Irish re-

public." Meanwhile agitation was to be continuous, so as to keep the idea of revolution always before the people.

Under the direction of the Revolutionary Brotherhood large assemblages of people were held. As many as three thousand attended some of these meetings. Here the common expression of sentiment took such form as "To hell with the landlords," "Damn the landlords," "Down with the landlords." To the landlords such epithets were applied as "British spies," the "Foreign element," "England's garrison," and "the governing class." The speakers discussed "the wrongs of the people" and urged their hearers to drive out the representatives of England, soldiery and landlords, to shoot them or get rid of them in any way, to overthrow English rule in Ireland, to resist the government "as Emmet did," to get new laws and establish a government of the people.

Accounts of the brotherhood and of the dispersion of its revolutionary assemblages in Achill Island were given by the following witnesses who belonged to the brotherhood, namely: Conway, Vesey, McNamara, Corrigan, Lynch, and the prisoner, and descriptions of similar meetings in other parts of Ireland were given by witnesses O'Mahoney and Donnelly.

The speeches at these gatherings were inflammatory. Members of parliament were among the orators. At a meeting on Achill Island one of these speakers aroused the people to great heat by his references to the death of Emmet and his appeals to his hearers to organize and strike the blow for liberty. Irish legislation, he declared, was unjust; the landlords were robbers, and the land should belong to the people. The speaker and his wife and others on the stage were arrested and the audience was scattered.

Incited by these addresses, the people destroyed barns, fishing stations, boats, cattle houses, and pounds; burned the homes of the landlords, and assaulted landlords, bailiffs, constables, sheriffs, and soldiery, killing many of them. They demolished the bridges and roads to block the approach of troops and make evictions impossible, poisoned the springs of water, burned the pasturage, cut off the tails of cattle, pushed cattle from cliffs into the sea, and seized arms and ammunition from the houses of the bailiffs. In these riotous proceedings women as well as men took part. At night, two or three times a week, men were drilled in military tactics. So thoroughly had they organized their opposition to the established order of things that evictions could only be made with the aid of large bodies of armed men. After one eviction, described by the witness Donnelly, the people openly advocated killing the sheriff and blowing the police to pieces, and so crushing landlordism at once. "They ought to be shot, killed, driven out of the country; they are nothing but robbers."

One of the witnesses, a reputable citizen of Indianapolis, and a former resident of Achill Island, testified to the character of these assemblages and the part the prisoner took in them. I quote from his story:

(*From the testimony of Thomas J. Lynch.*)

Q. (By Mr. Spaan.) Now, what was the contention of the tenants as to what rights they asserted over the land? What did they claim?

A. This land came down to them from time without record, from their great-great ancestors, and they naturally felt that it belonged to them; by right of title it belonged to them, and their ideas were to banish by any means whatever; to banish them from the place so that the lands would belong to the people.

Q. Were those matters spoken of in public meetings?

A. Why, certainly; that was the drift of those meetings and the object of them.

Q. Now then, the tenants, their theory was that the land, having been occupied by them and their ancestors from time immemorial, the right belonged to them?

A. Yes, sir; they called those landlords usurpers, that usurped their rights, of what rightfully belonged to them.

After detailing the specific cause of complaint for the charging of rent on pasture land that theretofore had been common, the examination continued:

Q. Now, you may state what expressions of feeling you heard among the people as the result of that conduct?

A. Well, the expressions of feeling were that they should do anything, burn them out, kill them out, do anything in order to banish them from the place so that they could get the place to themselves.

Q. Were those acts of the landlords spoken of at those meetings?

A. Certainly.

Q. And how were they received by the crowd?

A. Received with cries of "Banish them, burn them out, get rid of them any way."

Q. Was that conduct characteristic of all of those meetings that you were at?

A. All of those meetings. Yes, sir.

Q. In conversation with people over this island, or at their meetings at other places where you got together, you may state whether or not there were expressions of a similar character used?

A. It was always the same.

Q. What was the general feeling, then, of the people, of that class of people that you have described, towards the landlords?

A. Why, the general feeling towards the landlords was harsh, and they considered the landlords the English representatives in Ireland, and their feeling towards them was just the same as towards the English govern-

ment, and their ultimate object was to banish both out of the country and form a government for the people and by the people.

Q. Now, I will ask you if those matters, if those doctrines of self-government, whether or not they were proclaimed in those meetings?

A. Only in Irish, because if they were spoken in English it was treason.

Q. They were talked in Gaelic?

A. They were talked in Gaelic; if talked in English they would be arrested.

After stating that he had known the prisoner in Ireland, had attended meetings addressed by him, and had heard his speeches, the witness continued as follows:

Q. Now, what were the leading ideas in his thought—in his addresses?

A. To, if possible, procure the land for the people.

Q. And anything else?

A. And, as a general run of all meetings, his talk was, if possible, to procure the land for the people and break the power of the landlords, and in that way the power of the English government in the place.

Q. Now was anything said in his advocacy of any particular form of government?

A. Not in open meetings in the English language; if he talked anything like that it was done—

Q. (Interrupting.) Did you hear him talk in Gaelic?

A. I heard him talk that in Gaelic, or the Irish, as we call it.

Q. Was that at a meeting of the Irish tenantry, at a meeting of the Irish?

A. Yes, sir.

Q. What did he say in Gaelic on those occasions?

A. He said as much as that, by overthrowing the landlord power it was the first step towards overthrowing the English government and in that way establish a republic like the United States.

Q. Now, you may state if you know whether or not he was considered a leading character among your people over there in Ireland on those subjects?

A. He certainly was.

The prisoner was both an agitator and an organizer. He had been a member of the Land League and of the Irish Revolutionary Brotherhood for thirteen years, serving in official positions in each. His hostility toward the landlords and the authorities was known. He was watched by the police. No doubt, to the authorities he was a very troublesome character whom they deemed deserving of severe punishment should his advocacy of lawlessness ever lead him to crime.

As might be expected, meetings like these had to be forbidden by law. "The Criminal Law and Procedure (Ireland) Act" of 1887, in force until after 1894, empowered the lord lieutenant to establish "proclaimed districts," where something like martial law prevailed. By this act one who took part in riots and unlawful assemblages was severely punished. Penalties were imposed and summary jurisdiction was conferred to try charges of intimidation, of inducing tenants not to pay rent, of conspiring to boycott trade, of wrongfully resuming possession after eviction, of obstructing eviction, and of inciting others to any of these acts. Provision was made for transferring trials to a county where the offender was a stranger and hearing them before a special jury; and for the search of suspected premises without specifying the locality in the search warrant. The act gave to the lord lieutenant the power to declare any association formed for the commission of these or other offenses to be dangerous and to punish any who might be convicted of taking part knowingly in any meeting of such association. "Association" was declared to mean "Any combination of persons, whether known by any distinctive name or not." Proclamation by virtue of which these sweeping changes in the criminal procedure took place became effectual at once throughout Ireland upon

publication in the Dublin Gazette. It was retroactive as to many of the offenses to which it related. This and like statutes show that the Britsh parliament recognized that Ireland was in a state of unrest; that this unrest was due to agrarian agitation, and that the ordinary procedure of the criminal courts was powerless to maintain a condition of peaceful submission to governmental authority. In a sense, this revolt of tenant against landlord was an assault upon the political and social order of the state.

Achill Island was in a proclaimed district. At one time a large part of Ireland was so proclaimed. Pursuant to this law, assemblages of the tenantry were broken up by force, as many as four thousand troops taking part on one occasion and riding armed through and over the people. One witness testified to having seen fourteen mass meetings dispersed in the year 1892. This suppression of meetings was continuous until after October, 1894. Expressions of hatred toward the landlords were heard everywhere among the Achill Island tenants down to that time. The tenantry had been aroused by what they considered cruel wrongs at the hands of the owners of the soil. Evictions had been frequent and had been accompanied with destruction of the property both of landlords and tenants. These evictions were described on the witness stand. Out of holdings which had passed from father to son from time immemorial, residents of the island had been dispossessed, resisting the armed constabulary, militia and bailiffs with violence of all sorts. Once evicted they could secure no other holdings near by and were left to the charity of the neighbors, the alms of the church, and the shelter of the poorhouse. On the McDonnell estate the tenants were rebellious because of prosecutions and punishment for

trespass, evictions, and demands for higher rents, charges for sea weed, grazing, and turf, the right to which the tenants had always claimed. Vile names were given to Mrs. McDonnell. She became, in view of the islanders, the representative of a class whom they must drive out. Being in a state of sporadic insurrection, the tenants demanded concessions that they knew they could not have and made claims beyond all law and reason—none the less sincere, perhaps, because unreasonable—asserting ownership of lands that had been held adversely to their claims since the time of Cromwell. Of the five thousand islanders, almost all of the men belonged to the Land League and four hundred were members of the Irish Revolutionary Brotherhood. One hundred and seventy of the Brotherhood lived on and near the McDonnell estate.

Whether this island was peculiarly a center of revolutionary sentiment, or was typical of the poorer portions of Ireland, is not clear. There was evidence that the conditions in Achill Island were generally prevalent. And it is a fair inference from the stringency of the laws that insurrectionary sentiment existed in all parts of the kingdom. The land question was the only political question before the Irish people. Legislation intended to relieve the strain seems to have increased it, and the more the rebellious spirit of the tenantry was curbed the more lawless it became.

In 1894 the island tenantry broke out into another of their occasional uprisings. On October the second, a delegate meeting of the Irish Revolutionary Brotherhood was held. Here met fifteen or sixteen delegates representing the entire tenantry of Achill Island and including the prisoner, who was a district organizer for the Brotherhood. Five of the delegates rented from Mrs.

McDonnell. For some time her exactions, prosecutions, and evictions had been considered, and schemes of redress had been planned. This time the discussion was closed and the plan of campaign carried out a few nights later was adopted. Her barn and her house were to be burned, and an effort was to be made by the tenantry to frighten her. The sentiment was expressed that if she were a man she would be shot. Lots were drawn to determine which one of the members should fire the barn, and which should fire the house; and three were chosen by lot to commit the personal assault. The prisoner was not one of these. The story is that these plans were to be seconded by the tenantry in general. A few minutes after eight o'clock, on the evening of October the sixth, the fire broke out, and the prisoner, who was then at his home, went at once to the scene. There he found about half of the McDonnell tenantry. As the prisoner and his landlord stood in the midst of the excited crowd of men and women who were engaged in spreading the fire while they pretended to extinguish it, the prisoner struck her with his fist. She staggered into the arms of a party of men and women, and in the melee she was badly injured. Among these were the three men who had been selected by lot to punish her. The only motive of which we have direct evidence is to be found in the prisoner's testimony. I quote:

Q. Now, I will ask you if in your conduct that night you were actuated at all by any motive of personal feeling directed against Mrs. McDonnell on your part?

A. Not the slightest personal motive.

Q. And what was done there, you may state what that was the result of.

A. That was the result of the combination of the tenants and of the Irish Revolutionary Brotherhood men.

Q. Now, what was the object in view in treating her

in that way that was discussed at the meeting of the Irish Revolutionary Brotherhood?

A. To send her back to England, sir, to send her out of the country back to England.

Q. And what you did there that night, you may state whether or not that was done in furtherance of carrying out the plan that you had advocated from the public platform, that is, to regain the lands of Ireland for the Irish, to drive out the landlords, and establish a republican form of government in Ireland?

A. That was the sole and only reason.

Q. Did you have any personal motives at all against the woman as an individual, apart from this general motive?

A. Not the slighest.

Q. So far as you know, did any of the parties have any personal grudge against the woman?

A. Not personally.

Q. Did you talk with them on the subject?

A. I knew the feeling of every man, woman, and child on the estate; I knew their feelings so far as the tenants were concerned.

Some years before the prisoner had been in her employ as a veterinary surgeon and had been discharged. This had been his sole employment from her. He swore that he had had no personal dispute with her since that time, although in common with the other tenants he had rebelled against what the tenants considered her injustice toward them. The motive inferable from this might well be considered to be a class-motive as well as a personal one.

The prosecution of the prisoner was conducted by the attorney-general of Ireland, who came from Dublin to Castlebar for the purpose. The defense claims that this was a recognition by the government of the political character of the crime and, in view of the fact that the attorney-general challenged all jurors who were small

tenants and all who were members of the Land League, amounts, the defense says, to a practical construction that the offense was political. The full force of this conclusion is hardly justified. That the point is entitled to some consideration, however, is decided in the leading case of Re Castioni, L. R. (1891) Q. B., page 149.

The testimony of the prisoner as to the final act is uncontradicted, and it is unsupported. Nevertheless, upon many material phases of this case, phases tending to establish his defense, his story is supported by the uncontradicted evidence of other witnesses. If it were not for this corroboration, a decision of this case might be harder to reach. This prisoner's first oath in the court that was to hear his plea for liberty was a denial of his identity. This must have been deliberate perjury. One is apt to think that a political refugee should be a hero and a patriot. And much has been said in this trial about Robert Emmet. It is a far cry from that immortal dreamer to the agitator who, after his cowardly assault upon a defenseless woman, seeks to charge against his unhappy associates the odium of a detestable crime.

The Commissioner's Duty to Decide as to Political Character.

It has been argued with some force that the magistrate has no power to decide whether the offense on account of which extradition is sought is political, but that he is bound to leave this question to the President of the United States and the secretary of state. I am convinced that, having been designated by the statute and authorized and commanded by the court to hear and consider the question of criminality under the treaty, I am in duty bound to decide whether this was a political offense.

The authorities all seem to support this view (Re Ezeta, 62 Fed. Rep. 972, 996; Re Castioni, L. R. (1891) Q. B. 149; Hansard, Vol. 202, page 300) and I shall take the responsibility of exercising the power which the law has conferred upon me.

We must consider all the facts and then as a question of law determine whether the offense was an ordinary crime or whether in the light of the circumstances leading up to it, it was political in its character.

It is not a question of how detestable the acts were, nor of whether or not they have been punished adequately, nor of whether the trial in 1895 was a fair one. The question is one of law to be determined according to those principles of justice which we find in the decisions of the courts and according to the definitions that jurists have presented for our consideration.

The Definitions of "Political Offense."

There are not many of these definitions. Nor are the cases in which they are found much like the one under consideration. The definition adopted by Justices Denman, Hawkins, and Stephens, of the English Court of Queen's Bench, in the Castioni case, is taken from Justice Stephen's History of the Criminal Law of England. So far as it can be made applicable to the facts of this case it may be deemed to come with the highest authority. "The expression" (political offense) the court says, "ought to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed a part of political disturbances."

Re Castioni, L. R. (1891) Q. B. 149, 17 Cox, Cr. L. Cases, 228, Snow's Cases on Int. Law;

2 Stephen's Hist. Crim. Law in England, 70, 71.

This definition is approved by our federal court, *Re Ezeta*, 62 Fed. 972.

In discussing this subject in his leading cases on International Law (2d Ed.), page 40, Pitt Cobbett, says:

"Some offenses are from their very nature excluded" (from extradition). "Such would be high treason; riots for political purposes; seditious libels and conspiracies." "There must be two parties in the state, each striving to impose its own government on the other." *Re Meunier*, L. R. (1894) Q. B. 415.

A standard French authority declares political offenses to be "a name given to offenses tending to disturb" (ebranler) "the political or social order of the state." Kirchner L'Extradition.

Some light is thrown upon this subject by the debates in the British parliament (1866 to 1870) on the "Extradition Treaties Amendment Act" (184 Hansard, 2004, 2006, 2109, 2115). I quote:

Lord Stanley: "If a man were killed in a riot, or in an attempt to excite a tumult or popular insurrection, that probably would be regarded as a political offense."

Sir Francis Goldsmid: "An offense committed for the promotion, prevention, or obstruction of any political object."

John Stuart Mill: "Any offense committed in the course of, or in furtherance of any civil war, insurrection or political movement."

Distinguished from Assassination.

Political crimes are distinguished from assassination in the Pall Mall Gazette in this that "it is an essential characteristic of a political crime that it takes place openly and without attempt at concealment."

Quoted by F. N. Stone in 43 New Englander, 224.

Distinguished from Anarchy.

A clear distinction has been made by learned writers between political offenses and the crimes of anarchists. Those participating in a political offense, although they may seek to overthrow the social or political order, are planning at the same time to substitute some other form of government or social organization in its place. The anarchist, on the other hand, is generally an assassin. His crime is done in secret. He assails not only the existing government, but all government. This distinction has been recognized by the authorities. It follows that the recognition of the right of asylum for political refugees does not involve the protection of those whose aim has been to destroy government rather than merely to change it.

In seeming conflict with these judicial definitions there are a few academic discussions in the popular magazines where the contention is made that the exemption of "political offenses" ought to be limited to crimes committed in open warfare. It is nowhere stated that the exemption is limited in that way. This court is to take the law as it believes it actually is and not as it ought to be. And in deciding what it is, it must recognize as authoritative

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the judgments of courts of law rather than the opinions of students and doctrinaires.

RULES FOR INTERPRETING EXTRADITION TREATIES.

In applying these defintions to the facts of the case, to determine whether extradition shall take place, we must follow certain rules of interpretation.

"In my opinion," said a Canadian judge, "treaty regulations between states should be executed in good faith in a liberal spirit with a disposition to facilitate the obtainment of justice."

Ex Parte Phelan (Quebec), 6 Leg. News, 261.

I may say in passing that "the obtainment of justice" means the protection of the accused as well as the protection of society and contemplates acquittals as well as convictions.

A treaty is to be liberally construed so as to carry out its manifest purpose, "so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence."

Tucker v. *Alexandroff*, 183 U. S. 424, 437.

"I incline to think," says the chief justice of the Canadian Court of Appeals, "that there is a substantial difference between the manner in which we should deal with the law and with the facts in an extradition case. It is sufficient if the facts before us establish a case which if true is reasonably sufficient to put the accused upon his trial; but it is, I apprehend, incumbent upon us to see that the act charged constitutes an extradition offense, and unless it is established as a matter of law that it is so, the accused ought not to be surrendered."

Spragge, C. J., in *Re Hall*, 8 Ont. App. 31, 39.

The effect of this decision is to put on the demanding government the burden of proving that the crime is extraditable.

THE BURDEN IS ON THE DEMANDING GOVERNMENT.

These principles of interpretation lead to the conclusion that whatever may be the rule as to reasonable doubt, or the burden of proof, the magistrate must be satisfied that the offense is not political in its character before he can be justified in surrendering the prisoner. As still another Canadian judge put it: "My duty in the present case is to see in the first place whether the offense is non-political." *Re Levi,* L. R. (Quebec) Q. B. 151.

In the Ezeta case, Judge Morrow, of the United States Court, intimates that the question whether or not the offense is political shall be decided "according to the provisions of the law which shall prove to be most favorable to the accused." This is the rule as the court quotes it from the draft of the convention of the Montevideo, adopted in 1888. Judge Morrow says:

"The article cited may be at least accepted as expressing the wisdom of leading jurists and diplomats. The article is important with respect to two of its features: (1) It provides that a fugitive shall not be extradited for an offense connected with a political offense, or with an offense subversive of the internal or external safety of the state. (2) The test as to the character of the offense shall be made according to the provisions of the law which shall prove most favorable to the accused. The second provision of the article is founded on the broad principles of humanity found everywhere in the criminal law, distinguishing its administration with respect to even the worst features of our civilization from the cruelties of barbarism." *Re Ezeta,* 62 Fed. 972, 999.

If we are to construe the treaty liberally "so as to carry out its plain purpose," we must recognize that the clause exempting political crimes must have the same liberal construction that is to be given to the rest of the treaty. This is the only forum where the prisoner can try the question as to the political character of his crime. After he shall have been surrendered it will be too late to show by way of defense that his crime was political. Here and now he is entitled to a complete trial upon this one issue, for here alone is the issue of value to him. It follows that being tried upon an issue the determination of which may result in his return to a life imprisonment, he is entitled, on this one issue at least, to the guaranties and presumptions which American courts give to one accused of crime. It is as if he were charged with having done an act whose criminality consisted in its being non-political. The issue on that charge is clearly defined. If proved, he must be imprisoned for life; if not, he must be released. Where the law presents a choice of two conclusions, equally potent, that one must be taken which is "most favorable to the accused."

The demandant has argued that a murderous assault can not possess a political character if committed against a private citizen, unless committed in time of war. The argument is unsound. If a criminal assault were ever political it would seem that the very fact that it was committed against an official would make it so. And yet the treaties with Belgium, Luxemburg, and Russia declare that an assault "against the life of the head of the government shall not be considered a political offense." In the Castioni case the man killed was not an officer.

It is also suggested by way of argument that a crime is not political if done in a hopeless cause. The cause,

in other words, must have the dignity of real warfare. Surely the followers of John Brown or of Robert Emmet, had they escaped to a foreign country, could not have been extradited. The offenses were political which they committed in seeking to carry out their visionary assaults against established government. In the Emmet uprising, chance passers-by were assaulted by Emmet's followers and injured or killed, when their assailants must have known that such acts as these could not by any possibility change the government. There never was a moment when Brown or Emmet could have had reason to hope for success, yet the acts of their followers were political acts.

The American revolution grew out of a long period of social and political unrest caused by the oppression of alien rulers. For many years before the war of the revolution the loyalists suffered cruelties unspeakable at the hands of the American colonists. These brutalities form a striking parallel with the acts done by the tenantry in the west of Ireland between 1880 and 1894. The manes and tails of horses were cut off; men were tarred and feathered, ridden on fence rails, gagged and bound for days at a time, pelted with stones, advertised as public enemies, and boycotted. Bullets were shot into their bed rooms; valuables were extorted to save from violence; their houses and their ships were burned. They were compelled to pay the guards who watched them in their houses, and when carted about for the mob to stare at and abuse, they were compelled to pay something at every town. In one instance, the victim sought legal redress. A party of people disguised as Indians broke into his store, destroyed all his books and papers, laid waste his property, and threatened his life. Shortly afterward he went insane and died.

In describing these occurrences, an author (Sydney George Fisher) says:

"Any accidental circumstances would cause these visitations and often the victim was not as politically guilty as some of his neighbors, who by prudence or accident, remained unharmed to the end of the war."

True History of the American Revolution, page 156.

Many of these things were done ten years before the war.

A like parallel is found in occurrences preceding the French revolution. However odious the offenses done, there can be no doubt that in the case of the American colonists and of the French peasantry many of the acts committed were political in their character.

It is not necessary to a decision of this case either that we justify the movement of these tenants as patriotic or that we condemn it as foolish. They were fanatics who hoped to better their lot by upsetting existing conditions, social and political. In the landlord they saw the cause of all their misery. They believed that landlordism meant British rule. Back of the statute law, and back of the juries chosen under that law, and back of the courts, they thought they recognized the influence of the property-holding class, and they believed that in their assaults upon landlordism they were rebelling against hostile laws, hostile juries, and hostile courts. In the minds of this semi-rebellious tenantry, excited to frenzy by the appeals of unscrupulous agitators, and made desperate by the burden of poverty laid upon them by a system that was half social and half political, but, to their view, wholly hostile, it is easy to trace the growth of the idea that the mobbing of landlords, the expulsion

of bailiffs and the shooting of sheriffs and constables might lead in time to a reform in the legislation that was hateful to them and a change in the governing class, and perhaps to a parliament of their own to make laws for the tenantry and enable the tenantry to control the courts.

The Castioni case (Re Castioni L. R. (1891) Q. B. 149) is the leading case on the subject of the extraditability of political offenses. In this case Sir Charles Russell appeared for the prisoner, and the Attorney-General, Sir R. Webster, appeared for the demanding government. The decision is by three of England's most famous judges, Denman, Hawkins and Stephens. The opinions of the judges and the argument of counsel are instructive.

The fugitive, Castioni, had been drawn by accident into an assault upon the public armory in a little Swiss village, from which the men were attempting to take firearms. In the course of the riot a man was killed. The man's death was in no sense necessary for the success of the political movement in which he was sacrificed and it was considered by all parties to be a misfortune. Justice Denman said:

"The question really is whether upon the facts it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character, with a political object, and as part of the political movement and rising in which he was taking part. Now the only shadow of a suggestion of evidence to the contrary, I think, amounts to very little and it comes to really a nice disquisition as to the facts of the case as to what was taking place at the exact moment at which the shot was fired. . . . There is nothing in my judgment, to displace the view which I have taken, that at the moment at which Castioni fired the shot the reasonable

presumption is . . . that he at the moment, knowing nothing about Rossi" (the person killed), "having no spite or ill-will against Rossi, as far as we know, fired that shot; that he fired it thinking it would advance, and intending it to be in furtherance of the very object which the rising had taken place in order to promote, and to get rid of the government."

Justice Hawkins, said:

"I can not help myself thinking that everybody knows that there are many acts of a political character done without reason, done against all reason; but at the same time one can not look too hardly, and weigh in too golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are contrary to reason, but, nevertheless, an act done of this description may be done for the purpose of furthering and in furtherance of a political act and a political rising, even though it is an act which may be deplored and lamented as even cruel and against all reason by those who can calmly reflect upon it after the battle is over."

Other offenses deemed in reported extradition cases to be political in their character may be referred to as supporting the authority of the Castioni case.

In the Cazo case (1 Moore on Extradition, 324), Mexico sought to extradite Francisco J. Cazo and his accomplices. It seems that thirty or forty raiders had taken and kept possession of a little Mexican town for two or three days, fighting the citizens, seizing horses and other property, and doing acts of violence of all sorts. They kept shouting, "Hurrah for Don Francisco J. Cazo, and death to the Garra party." There was no effort to conceal the identity of the raiders. But they were only raiders, with no government to establish. The secretary of state, Mr. Thomas F. Bayard, held that the

affair was an avowed partisan political conflict and the raiders could not be surrendered.

In the Ezeta case (62 Fed. R. 972) the crimes for which extradition was sought consisted of murder, assault with intent to kill, and the robbery of a bank. The crimes were done by ex-President Ezeta and others, fugitives who had been part of the government of Salvador, had been overthrown in revolution, and in their flight had robbed the bank to pay Ezeta's soldiers. The United States Court held all these acts political, notwithstanding the failure of Ezeta's cause, and refused to return the fugitives.

One other case may be mentioned. That is *Ornelas* v. *Ruiz,* 161 U. S. 502. The crimes charged were murder, arson, robbery, and kidnapping. A band of one hundred and forty armed men crossed the line from Texas into Mexico, attacked forty Mexican soldiers, killing some and injuring others, burned barracks, assaulted private citizens, and seized their horses, burned their houses, and extorted small sums of money from women. They were bandits without flag or uniform, but wearing a red band on their hats. The commissioner held the offenses extraditable and the district judge sought to overrule the decision of the commissioner, holding that the offenses were political. The supreme court ruled that if the finding of the commissioner had any evidence at all to support it was final. I only mention it to show that the judge considered these acts to be political.

The number of reported cases in which this question is involved is surprisingly small. Extradition was denied on political grounds in all but one. In that one the higher court held likewise, but its holding was ineffectual. It is true that all are cases where men were armed and engaged in a quasi military struggle or at least an

armed riot. There is no case in which extradition was either granted or denied on political grounds where the uprising involved the hopeless struggle of a people to whom arms were denied. The present seems to be the first case. And it must be decided upon principle and according to the judgment and conscience of the magistrate.

Having considered the precedents and selected our definitions, let us apply the definitions to the facts of this case. Crimes "incidental to and forming a part of political disturbances," "riots for political purposes," "offenses tending to disturb the political or social order of the state," "two parties, each striving to impose its own government on the other;" these definitions are authoritative. "Done in a riot or in an attempt to excite a tumult or popular insurrection," "offenses committed for the promotion of any political object," or "in the course of or in furtherance of an insurrection or political movement." These are less authoritative, but they are illuminating. Do they fit the case?

It is evident to me that the assault on Mrs. McDonnell was incidental to, and a part of, a popular disturbance; that the popular disturbance, including the prisoner's part in it, had its origin and cause in a popular movement to overthrow landlordism and was done to further that movement, and that this movement, futile though it was, did disturb the political and social order of Ireland; that these people would have been in a state of open insurrection had not the right to bear arms been denied them; and in fine, that the riot of October the sixth was for political purposes and that its participants were engaged in a partisan conflict whose object was a change of laws and an upsetting of existing political conditions.

The real test lies deeper than definitions. It is this: Would the crime have been done had there been no political motive and no concert of action to effect that motive? Would the fire and the ensuing riot have occurred save for the long chain of moving causes that preceded it—the discontent of the tenants as a class, the agrarian agitation, the enactment of odious laws, the disagreements between the various tenants in the island and their landlords, the knowledge that like disagreements existed all over Ireland, the dispersing of the Brotherhood meetings and the arrest of its speakers; and, finally, the meeting of October the second, when the delegates chosen by four hundred members of a revolutionary order determined to drive this landlord out of the country. I am convinced that these things were all moving causes that led up to the climax of October the sixth, and that their relation to the riot and the assault was so intimate that they lent their character to the assault itself.

Disgraceful though an assault on a woman must always be, I am convinced that under the terms of the extradition treaty with Great Britain this was an offense of a political character for which the prisoner can not be surrendered. Let him be discharged.

And thereupon the prisoner was by me discharged.

CHARLES W. MOORES,
United States Commissioner.

UNITED STATES OF AMERICA,
District of Indiana, ss:

The foregoing is a true, full and complete transcript of the proceedings had before me in said cause, to wit: the extradition proceedings against James Lynchehaun and of the judgment and findings therein rendered by

me as the same in fact occurred and as the same appear in the records and documents in my office, at the city of Indianapolis, in the said district.

Witness my hand and seal this 26th day of March, 1904.

(L. S.)

CHARLES W. MOORES,
United States Commissioner.

APPELLEE'S BRIEF

FILE COPY.

APR 2- 1904

JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

No. 563.

HENRY C. PETTIT, UNITED STATES MARSHAL FOR THE DISTRICT OF INDIANA, *Appellant*,

v.

THOMAS WALSHE, *Appellee*.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR APPELLEE.

ADDISON C. HARRIS,
F. WINTER,
Attorneys for Appellee.

The Hollenbeck Press, Indianapolis.

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BRIEF FOR APPELLEE.

The appeal in this case is from a judgment by which the appellee was discharged upon a writ of habeas

corpus from arrest and imprisonment by the appellant, the marshal of the United States for the district of Indiana. The petition for the writ and the marshal's return thereto showed that appellee had been arrested upon a warrant issued by John A. Shields, United States commissioner for the southern district of New York and also commissioner to act in extradition proceedings, by which the arrest of one James Lynchehaun, to be brought before said commissioner at his office in the city of New York, was commanded in order that the matter of his extradition to the kingdom of Great Britain and Ireland as an escaped convict should be heard. Upon the hearing of exceptions to the marshal's return, which justified the arrest and imprisonment of the appellee solely by authority of the warrant referred to in the petition, the court below held that the appellee, having been arrested within the district of Indiana, could not be taken out of the district under said warrant for hearing of the complaint upon which the same was issued, but was entitled to be tried in the district of Indiana. No exception was taken by appellant to this ruling, and thereupon appellee was discharged.

The ruling of the court below in sustaining the exceptions to the marshal's return, and in discharging appellee from arrest, are assigned for error. The appellee has filed in this court an answer to the assignments of error accompanied by a certified transcript of proceedings had before Charles W. Moores, United States commissioner for the district of Indiana and commissioner appointed to act in matters of extradition, from which answer and transcript it appears that the appellee and James Lynchehaun are one and the same person, and that immediately upon the appellee being discharged upon the writ of habeas corpus

from which this appeal is prosecuted, C. Clyde Bayley, his Britannic Majesty's consul at the port of New York, upon whose complaint the warrant had been issued, immediately, without excepting to the decision of the court below from which this appeal is prosecuted, acquiesced in such decision and made complaint under oath to the Hon. Francis E. Baker, judge of the Circuit Court of the United States for the district of Indiana, by whom said decision had been made, asking that a warrant be issued for the arrest and extradition of appellee, by the name of James Lynchehaun, on the ground that he was an escaped convict, being the same matters, and not other or different, embraced in the complaint before Commissioner Shields, and his warrant thereunder, from arrest and imprisonment under which the appellee had been discharged as shown by the record in this cause; upon which complaint Judge Baker issued his warrant to the appellant, the marshal for the district of Indiana, returnable to the Hon. Charles W. Moores, United States commissioner for the district of Indiana, and also commissioner specially authorized to act in matters of extradition, under which warrant appellee was thereupon arrested by the appellant and brought before said commissioner, by whom the matter of said complaint was heard on the merits, and by whose judgment rendered therein on the merits, the appellee was thereafter, on the 31st day of October, 1903, discharged; which judgment is still in full force.

Points and Authorities.

I.

1. On every writ of error and appeal the first and fundamental question is that of jurisdiction, and the court, of its own motion, will refuse to proceed where want of jurisdiction appears on the face of the record.

Continental National Bank v. *Burford*, 191 U. S. 119.

2. The jurisdiction in this case depends upon whether the construction of a treaty is involved.

Act March 31, 1891, § 5, 1 U. S. Compiled Statutes, 1901, chapter 8*a*;

Cross v. *Burke*, 146 U. S. 82;

Ex parte Lennon, 150 U. S. 393;

Craemer v. *State*, 168 U. S. 124.

3. This case depends for its decision upon the construction of the statutes relating to fugitives from the justice of a foreign country, and regulating the appointment and defining the powers of United States commissioners. It does not involve the construction of any treaty.

§ 5270, 3 U. S. Compiled Statutes, 1901;

§ 19, Act May 28, 1896, § 621, 1 U. S. Compiled Statutes, 1901;

§ 1014, 1 Compiled Statutes, U. S. 1901;

§ 1, Act August 18, 1894. 1 Compiled Statutes U. S., p. 717.

II.

There was no exception to the ruling and judgment of the court below, but, on the contrary, the

British government, at whose instance the appellee was under the arrest from which he was discharged by such judgment, acquiesced in the judgment by procuring appellee to be again arrested and tried upon the same charge, before a United States commissioner for the district of Indiana, in accordance with the judgment of the court below in this case. This was a waiver of error in said judgment, and of the right to appeal therefrom.

Liebuch v. *Stahle*, 66 Iowa 749;
Gordon v. *Ellison*, 9 Iowa 317;
Carr v. *Casey*, 20 Ill. 637;
Holland v. *Commercial Bank*, 22 Neb. 585;
Wilson v. *Roberts*, 38 Neb. 206;
Brooks v. *Hunt*, 17 Johns. 484;
Ehrman v. *Astoria*, 26 Oregon 377;
McAfee v. *Kirk*, 78 Ga. 356.

III.

The answer to the assignment of errors shows that immediately upon the appellee being discharged from arrest under the warrant of Commissioner Shields, the British government, upon whose complaint that warrant had been issued, immediately procured the appellee to be rearrested upon the same charge, upon a warrant issued by Judge Baker, and brought before Commissioner Moores, of the district of Indiana, pursuant to the command of the warrant, by whose judgment, still in full force, appellee was acquitted and discharged upon the merits, after a full hearing. This judgment, while in force, is final, and disposed of the subject-matter. The court can not afford any substantial relief in the present case, which presents simply a moot question.

Tennnssee v. *Condon*, 189 U. S. 70–71;
Mills v. *Green*, 159 U. S. 653;
California v. *Railroad*, 149 U. S. 314;
Dakota v. *Glidden*, 113 U. S. 225;
Dinsmore v. *Express Co.*, 183 U. S. 120;
Codlin v. *Kohlhausen*, 181 U. S. 151;
Kimball v. *Kimball*, 174 U. S. 159;
New Orleans Flour Inspectors, 160 U. S. 170;
Washington, etc., v. *Columbia*, 137 U. S. 62;
Little v. *Bowers*, 134 U. S. 547;
San Mateo County v. *Southern Pac. R. Co.*, 116 U. S. 138;
Coryell v. *Holcombe*, 9 N. J. Eq. 650;
In re Treadwell, 111 Cal. 189.

IV.

The hearing of an application for the extradition of a fugitive from the justice of a foreign government, arrested upon the warrant of a United States commissioner, must be had in the district in which the alleged fugitive is found and arrested.

(1) United States commissioners are appointed by the district courts "at such places in the district as may be designated by the district court" and "shall have the same powers and perform the same duties as are now imposed upon commissioners of the circuit courts."

§ 19, Act May 28, 1896;
1 Compiled Statutes U. S., 1901, p. 499.

(2) Among these powers is the power to issue warrants for the arrest, and hear the evidence as to criminality of persons charged with being fugitives from the justice of foreign governments.

§ 5270, 3 Compiled Statutes, U. S., 1901.

(3) But the person to be arrested must be found within the limits of the commissioner's district.

Otherwise the provision that the person charged shall "be found within the limits of any state, district or territory," following the enumeration of the courts and magistrates authorized to act, and whose jurisdiction in some instances is limited by state, and in others by district and territorial lines, would be meaningless.

§ 5270, 3 Compiled Statutes U. S. 1901.

(4) The extradition of a fugitive from justice is a criminal proceeding. The evidence of criminality must be heard and considered.

Rice v. *Ames*, 180 U. S. 374, 375;
§ 5270, 3 Compiled Statutes U. S. 1901.

(5) As such it is within the statutory requirement that the officer issuing the warrant shall attach thereto a certified copy of the complaint, and upon arrest being made that the marshal shall take the defendant before the nearest United States commissioner or nearest judicial officer having jurisdiction to hear, and commit or take bail, who shall have jurisdiction as fully as if the complaint had originally been made before him.

§ 1, Act Aug. 18, 1894, chapter 301; 28 Stat. 416;
1 Compiled Statutes U. S. 1901, chapter 18, page 717.

(6) The defendant has a right to be examined as a witness in his own behalf, if he is a competent witness by the laws of the state in which he is found.

In re Farez, 7 Blatchf. 345;
Fed. Case, No. 4645.

In this case the court said: "The proceedings before a magistrate in this district in a case of extradition must be conducted according to the law of the state of New York, in the particulars in which such proceedings are not specially regulated by a statute of the United States."

(7) The commissioner failed to observe the mode of procedure designated by the law of the state of Minnesota, by refusing to permit the prisoner to examine witness in his own behalf, and it was held that his commitment was illegal.

In re Kelley, 25 Fed. 268.

(8) The competency of evidence is to be determined by the law of the state in which the hearing is had.

In re Charleston, 34 Fed. 531.

(9) The proceedings for arrest, hearing and commitment for trial, or discharge, of persons charged with crimes or offenses against the United States are required to be had agreeably to the usual mode of process against offenders in the state where such person is found, and after commitment in a district, other than that in which the offense was committed, the district judge issues a warrant for his removal to the district where the trial is to be had.

§ 1014, 1 Compiled Statutes, 1901;
In re Farez, 7 Blatchf. 345;
Fed. Case, No. 4645.

V.

If there were conflict between the treaty and the statutes, the latter, being later in enactment, would control.

Horner v. *U. S.*, 143 U. S. 570;
Head Money Case, 112 U. S. 580;
Whitney v. *Robertson*, 124 U. S. 190;
Chinese Exclusion Case, 130 U. S. 581.

VI.

But there is no conflict. The treaty itself has reference to and recognizes the territorial and governmental subdivisions of the United States.

1. "The evidence of criminality must be such as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed."

Article X of Treaty of 1842 between the United States and Great Britain.

8 Stat. at Large 572, 576.

(2) Under this, if the acts alleged to have been committed are not criminal by the statutes of the United States, resort must be had to the laws of the state.

Wright v. *Henkel*, 190 U. S. 40;
§ 1014, Compiled Statutes U. S. 1901;
In re Farez, 7 Blatch. 345;
Federal Case No. 4645.

VII.

The case *In re Henrich*, 5 Blatch. 414, Federal Case No. 6369, is the only case in which it has been held that the prisoner may be taken for hearing from the state in which he was found and arrested, to the state in which the commissioner was appointed and resides. In this case, as stated in the opinion of the court below in the case at bar, the court did not consider that the dual character of our government was recognized by the extradition treaties, and considered only the provisions of the 27th section of the Judiciary Act of 1789, limiting the power of marshals to execute precepts to their own districts, and of the 33d section, as to its provision for the removal of prisoners for trial from one district to another. Much weight is given to the fact that the warrant was issued by a Justice of the Supreme Court and directed to any marshal of the United States. The question was not involved or decided *In re Fergus*, 30 Fed. 607; nor in any other case, until the decision in the case at bar. The Act of August 18, 1894 (1 Compiled Statutes, 1901, ch. 18, p. 717), was enacted long subsequent to the decision in the Henrich case.

VIII.

The construction contended for by appellant involves the establishment of the power to arrest a presumably innocent man at his place of residence, and to remove him therefrom without any hearing as to the rightfulness of his arrest, to the most distant part of the country. He may be taken from New York to Alaska, or from Australia to

London. We submit that such a construction should not be adopted unless clearly required by the statute.

Respectfully submitted,

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